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No. 87-209

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

SHERMAN COLLEGE OF STRAIGHT CHIROPRACTIC, AND STRAIGHT CHIROPRACTIC ACADEMIC STANDARDS ASSOCIATION, INC.,
Petitioners,

v.

AMERICAN CHIROPRACTIC ASSOCIATION, INC., THE COUNCIL ON CHIROPRACTIC EDUCATION, INC., NATIONAL BOARD OF CHIROPRACTIC EXAMINERS, AND SID E. WILLIAMS,
Respondents.

BRIEF OF RESPONDENT AMERICAN CHIROPRACTIC ASSOCIATION, INC., IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the District Court, in evaluating respondents' support of the educational standards of respondent Council on Chiropractic Education ("CCE"), which required chiropractic colleges to provide their students with adequate training in didactic and clinical diagnosis, correctly concluded that petitioners had failed to establish that respondents had unreasonably and illegally restrained trade in the markets for chiropractic education and for chiropractic services.

2. Whether, where the only competitive injury suffered by petitioners occurred as a result of action by those state legislatures and state chiropractic licensing boards which required candidates for admission to practice to graduate from CCE-accredited colleges, and respondents had successfully petitioned these state agencies to accept the prodiagnostic philosophy incorporated in CCE's Educational Standards, the District Court correctly concluded that respondents are entitled to the Noerr-Pennington immunity from antitrust prosecution.

3. Whether the District Court properly granted the motion of respondent American Chiropractic Association ("ACA"), under Fed. R.Civ. P.41(b), to be dismissed from the case, upon the basis that petitioners had failed to present evidence from which one could infer anti-competitive intent on ACA's part, and that the more appropriate inference was that ACA had acted independently to further the best interests of the chiropractic profession and its members.

RULE 28.1 LIST

Respondent American Chiropractic Association, Inc., a Delaware non-profit corporation, states, pursuant to Rule 28.1, that it has no parent, subsidiary, or affiliated companies.

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COUNTERSTATEMENT OF THE CASE

At the conclusion of plaintiff-petitioners' case, on March 26, 1985, the District Court granted the motion of defendant-respondent American Chiropractic Association, Inc. ("ACA") to dismiss under Fed.R.Civ. P.41(b), finding that, upon the facts and the law, petitioners had shown no right to relief, see the District Court's January 16, 1986 Order, Pet.App. 62a-65a. Dismissal was based on plaintiffs' failure to "present sufficient evidence to give rise to an inference of anti-competitive intent on ACA's part," and the Court's finding "that a more appropriate inference from the evidence presented is that ACA, acting as a trade association for the chiropractic profession, undertook activities to further the perceived best interests of the profession and its members." The Court also stated that it adopted for the purposes of its Order the Findings of Fact and Conclusions of Law set forth in its Order of January 9, 1986, see Pet. App. 16a-55a, which at the conclusion of the trial dismissed the case as to defendant-respondents CCE and National Board of Chiropractic Examiners.

On appeal to the U. S. Court of Appeals for the Eleventh Circuit, that Court in a summary *per curiam* opinion affirmed the judgment of the District Court on the basis of that Court's January 9 Order, see Pet. App. 1a-2a, 66a-69a, and denied petitioners' Petition for Rehearing, and for Rehearing En Banc, *ibid,* 70a-73a.

Rather than burden the Court with a counter-statement to Petitioners' Statement of Facts, which is largely inconsistent with the District Court's Findings of Fact and irrelevant to the issues, ACA respectfully

refers this Court to the District Court's findings, see Pet. App. 4a-16a, which were not challenged on the appeal to the Eleventh Circuit.

To explain the basis for ACA's dismissal from the case and clarify ACA's relationship to CCE, the accrediting agency for the chiropractic profession, further factual information is relevant: — ACA is a national service association of chiropractors, engaged in general educational and informational activities, but is not involved in undergraduate chiropractic education, chiropractic practice or accreditation. Pursuant to ACA's by-laws, it has a special responsibility to "protect the professional welfare of its members" and "to establish in the public mind an understanding which will assure maximum recognition and acceptance of the profession, its programs and practices."

Petitioners, with respect to the issue of ACA's antitrust liability, focused on ACA's sponsorship of, financial contribution to and alleged "control" of CCE, the accrediting agency for the chiropractic profession, officially recognized by the U. S. Office of Education, which prescribes educational standards for chiropractic colleges. However, they presented no evidence that ACA ever exercised any influence or control over CCE's formulation of educational standards or accreditation policies. Further, in *Sherman College of Straight Chiropractic* v. *Commissioner of Education*, 493 F. Supp. 976 (D.D.C. 1980), another lawsuit brought by petitioner Sherman College, the Court held that CCE was "autonomous" as defined by the governing federal regulations, 34 C.F.R. §603(d), and concluded that CCE "performs no function that would be inconsistent with the formation of an independent

judgment of the quality of an educational program or institution."

The regulations for accrediting agencies contemplate that they will be sponsored and supported by professional organizations such as ACA, and such sponsorship and support is clearly in the interests of the professional organization. In ACA's case, such support for CCE, and the training of students in diagnosis required by its Educational Standards, was especially important. As was pointed out in *Wilk* v. *American Medical Association*, 719 F.2d 213 (7th Cir. 1983), *cert. denied*, 467 U.S. 1210, 104 S.Ct. 2399 (1984), the American Medical Association and its affiliated network of national and local organizations had, since the 1960s, been pursuing a nationwide campaign to bring about "the containment of chiropractic and, ultimately the elimination of chiropractic" from the health care market. Basic to this campaign was the promoting of "the position of the medical profession that chiropractic is an unscientific cult whose practitioners lack the necessary training and background to diagnose and treat human diseases" (*id*). It was the practical need of the chiropractic profession to protect itself from this defamatory and injurious campaign and to establish its professional integrity which led ACA and its members to support CCE and its improvement of educational and training standards, not any anti-competitive intent directed against Sherman College.

The state of the case law also suggests that ACA's support of the diagnostic philosophy was a measure of self-protection for the chiropractic profession. Numerous decisions have held chiropractors liable for malpractice for misdiagnosis or failure to recognize

the symptoms of various diseases. *See, e.g., Abos* v. *Martin,* 88 P.2d 797 (Cal.1939) (liability for failure to detect tuberculosis of the spinal column); *Willett* v. *Rowlkamp,* 16 N.E. 2d 457 (Ohio 1939) (liability for failure to take x-rays); *Salazar* v. *Ehmann,* 505 P.2d 387 (Colo. 1972) (liability for failure to take x-rays); *Channes* v. *Odum,* 339 N.E.2d 238 (Ill. 1979) (failure to recognize herniated disc and to recognize that chiropractic treatment was inappropriate); *Nostrom* v. *Pettibon,* 607 P.2d 864 (Washington 1980) (liability for failure to recognize medical problem and refer patient to medical doctor); *Roberson* v. *Counselman,* 686 P.2d 149 (Kan. 1984) (doctor of chiropractic held liable for failure to recognize that the patient's symptoms indicated the presence of acute heart disease); *Jansen* v. *Mulder,* 205 N.W. 158 (Mich. 1925) (liability for failure to recognize diphtheria); *Dowell* v. *Mossburg,* 355 P.2d 624 (Ore. 1960), *rev'd on other grounds,* 359 P.2d 541 (Ore. 1961) (failure to recognize diabetes). *See also* Chiropractor's Liability for Failure to Refer Patient to Medical Practitioner, 58 A.L.R. 3d 590 (1974).

From a physiological standpoint, "back pain," the common ailment that brings a patient into a chiropractor's office, may have as many as fifty-eight different causes, both related and unrelated to the spine, including coronary thrombosis, lung disorder, duodenal ulcer, cancer of the stomach, most pelvic conditions (especially diseases of the ovaries and uterus), and liver, kidney, bladder, prostate, intestinal and other diseases, *see* Plaintiffs' Exhibit 258 at pp. 3-4. Adequate training in clinical and differential diagnosis is essential to determine which of these causes is responsible for the "back pain," so that the patient

either may receive appropriate chiropractic treatment or be referred to a qualified health care practitioner, thereby protecting chiropractic's professional reputation and economic interests.

The Task Force established by ACA in June of 1978 was another indication of the general concern that members of the chiropractic profession felt that the existence of chiropractors with the limited view of their profession held by the anti-diagnostics would give the American Medical Association ammunition to attack chiropractic's good reputation and keep it from evolving as a responsible, separate and distinct profession. The Task Force scarcely got off the ground. Although members made speeches and delivered papers during a two or three-hour session in Washington, the Task Force never even delivered a report to the ACA House of Delegates.

SUMMARY OF ARGUMENT

The petition for certiorari should be denied because of (1) the unimportance of the issues presented, (2) the absence of conflict of the decision below with those of this Court or other Circuit Courts, and (3) the unnecessary burden on this Court if it had to review statements and contentions in petitioners' brief that are inconsistent with the unchallenged findings of the District Court. On the facts of this case, the District Court correctly decided that (4) respondents had not unreasonably restrained the markets in chiropractic education and chiropractic practice, (5) respondents qualified for the immunity from antitrust suit conferred under the Noerr-Pennington doctrine for lobbying activities, and (6) the District Court properly granted, at the conclusion of plaintiffs' case,

ACA's Fed. R. Civ.P.41(b) motion to be dismissed from the action.

REASONS FOR DENYING THE WRIT

1. The unimportance of the issues presented by the petition

The Eleventh Circuit, after careful consideration of the record covering ten days of trial and hundreds of exhibits, extensive briefs and oral argument, summarily dismissed petitioners' appeal and denied them a rehearing and a rehearing en banc (see p. 1, above). This is persuasive indication that the petition raises no issue important enough to warrant this Court's supervision. In terms of this Court's Rule 17.1(c), petitioners have not shown that the Eleventh Circuit has sanctioned such a departure by the District Court from the usual and accepted course of judicial proceedings as to call for this Court's supervision.

2. The District Court's decision is not in conflict with decisions of this Court or other Circuit Courts of Appeal

A judicial decision that activities do or do not constitute an unreasonable restraint of trade is necessarily based on the facts of the individual case before the Court. The facts of this case differ so completely from the facts involved in the "group boycott" and other cases cited by petitioners that it cannot be said that the decision of the Court below conflicts with the decisions of this Court or other Circuit Courts of Appeal.

Thus, the "group boycott" decisions occur in a commercial context and involve coercive tactics by suppliers of goods and services that inflict direct economic

injury on their competitors or customers. On the other hand, this case occurs in a health care context involving CCE, the accrediting agency for the chiropractic profession, which prescribes educational standards for chiropractic colleges, including training in didactic and clinical diagnosis. While CCE and its educational standards have the support of the overwhelming majority of chiropractic colleges and practitioners, nothing coercive occurs until a State legislature or chiropractic licensing board endorses those standards, by requiring candidates for admission to practice to be graduates of a CCE-accredited college. ACA, which does not deal with Sherman College and is not engaged in chiropractic undergraduate education, practice or accreditation, can hardly be charged with participating in a boycott of petitioner Sherman College.

Even the cases cited in the health care field by petitioner relate to commercial practices. Thus, *Federal Trade Commission* v. *Indiana Federation of Dentists,* 106 S. Ct. 2009 (1986), which was decided after the District Court's opinion, was claimed by petitioners to have been erroneously ignored by the Eleventh Circuit (Pet. pp. 34-35). It dealt with a conspiracy of a commercial nature among Indiana dentists, their patients and the patients' insurers, involving the dentists' collective refusal to submit x-rays to dental insurers for use in the determination of benefits, which made it more costly for insurers and patients to obtain information needed to evaluate dentists' diagnoses. Similarly, *Virginia Academy of Clinical Psychologists v. Blue Shield of Virginia,* 624 F.2d 476 (4th Cir. 1980), *cert. denied,* 450 U.S. 916, 101 S. Ct. 1360 (1981), held anti-competitive collective

requirements that psychologists submit their bills through psychiatrists. Without reviewing the other cases cited by petitioners, it may safely be said that they also deal with radically different factual contexts and do not involve the quality health care and public interest presumptions found applicable in this case (see Pet. App. 25a-26a). They are therefore not in conflict with the District Court's decision.

3. The grant of certiorari would involve this Court in the unnecessary and burdensome review of statements and contentions that are inconsistent with the District Court's unchallenged findings.

The District Court's unchallenged fact findings (Pet.App. 4a-16a) show in considerable detail that the present controversy arose from the conflict between the pro-diagnostic and anti-diagnostic philosophies held within the chiropractic profession. This conflict culminated in the official requirement, adopted by all but eleven competent State legislative and administrative bodies, after public hearings, that candidates for licensure be graduates of CCE-accredited colleges and consequently adequately trained in didactic and clinical diagnosis.

Petitioners' Statement of the Case consists largely of contentions and statements that have no support in the lower Court's findings. One of their main contentions is that the CCE standards and the people supporting them have medical objectives that go beyond the permissible practice of chiropractic and permit chiropractors to practice medicine in violation of state law (Pet. pp.4-10, 18-20). This is neither true nor, in a case involving educational standards, relevant, since ACA, CCE and chiropractic colleges recognize that chiropractors must practice their

profession in accordance with the laws of the State in which they operate. Also, the petitioners erroneously contend that false testimony was given, before the U. S. Department of Education, that CCE did not impose medical objectives on the colleges (Pet. pp. 15-17).

Other fallacious contentions of the petitioners not found by the Court as facts are (a) that the CCE standards "were financially, not educationally, motivated and [were] not based on studies or data" (Pet. p. 14); (b) that the public will be bilked when patients are referred after diagnosis to medical doctors (Pet. p. 22); (c) that ACA had agreements with CCE not to accredit Sherman College unless it advocated the medical concept of chiropractic (Pet. p.30); and (d) that ACA had an anti-competitive purpose and an anti-competitive effect (Pet. p.30) — the former contradicted by the District Court's decision of January 16, 1986 and the latter by its decision of January 9, 1986 (Pet.App.25a-26a).

This Court should not grant certiorari where it will have to review these and other fallacious factual statements and contentions that are inconsistent with the District Court's findings.

4. The District Court correctly held that petitioners had failed to establish an unreasonable restraint of trade in the markets for chiropractic education and chiropractic services.

Despite the failure of petitioners to identify the relevant markets in this case, the District Court decided that they were the markets for chiropractic education and chiropractic services (Pet. App. 16a-17a). It concluded that the "rule of reason" rather than the *per se* rule was the appropriate test to apply, and

we assume that petitioners are no longer advocating the untenable position that the *per se* rule applies. The District Court, after stating the opposing contentions of the parties, correctly concluded that petitioners had failed to meet their burden of producing evidence that respondents unreasonably restrained the market for either chiropractic education or services, basing its conclusions on the absence of proof of anti-competitive effects (Pet.App.17a-26a). Petitioners have shown no substantial basis for asking this Court to review these conclusions, based as they were on their failure to produce evidence in a case where quality health care and the public interest were found to have been served by the promotion of enhanced education and training requirements.

5. The District Court correctly decided that respondents are entitled to the Noerr-Pennington immunity from antitrust prosecution.

The only competitive injury suffered by petitioner Sherman College occurred as a result of state action — the requirement of 39 state legislatures and chiropractic licensing boards that candidates for admission to practice be graduates of CCE-accredited colleges. Respondents have appeared before these state agencies to support this requirement, because of their legitimate interest in having properly qualified chiropractic practitioners, adequately educated and trained in didactic and clinical diagnosis and other procedures in accordance with CCE's educational standards. But such lobbying does not by itself exclude the graduates of non-CCE-accredited colleges from admission to practice, or inflict competitive injury on Sherman College.

The Court below correctly held that respondents' lobbying of state agencies immunized them from antitrust liability under the Noerr-Pennington doctrine, a doctrine based on the First Amendment protection of the constitutional rights of petition and free speech and the need for open communication between the public and its lawmakers, "which is vital to the functioning of a representative democracy," see *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, 137-38 (1961); *United Mine Workers* v. *Pennington*, 381 U.S. 657 (1965); *Lafayette* v. *Louisiana Power and Light Co.*, 435 U.S. 389, 399 (1978). ACA sees no need to duplicate the elaborate analysis of the Noerr-Pennington doctrine and its judicial progeny contained in the District Court decision (Pet.App. 26a-55a), demonstrating that the "sham exception" and the "public co-conspirator exception" are inapplicable in this case.

Petitioners' contention that the Noerr-Pennington doctrine does not apply to the lobbying of a standard-setting organization such as CCE (see Pet. App. 38-43) was first raised about ten days before the Eleventh Circuit summarily affirmed the District Court's Order, when petitioners submitted the Justice Department and Federal Trade Commission *amicus* briefs in the *Indian Head* and *Sessions Tank Liners* cases, and the Circuit Court promptly returned them to counsel as inappropriate authority in the appeal. Their argument has no application to this case, since respondents never lobbied CCE (see pp. 2-3, above) and therefore never claimed Noerr-Pennington immunity for that activity.

6. The validity of ACA's early dismissal from the action at the end of plaintiffs' case pursuant to ACA's Fed. R.Civ. P. 41(b) motion.

At the conclusion of plaintiff-petitioners' case, the District Court granted ACA's Fed. R. Civ.P.41(b) motion to be dismissed from the case, on the basis that petitioners had failed to present evidence from which one could infer anti-competitive intent against petitioners on ACA's part, and that the more appropriate inference from their evidence was that ACA had acted independently to further the best interests of the chiropractic profession and its members (see Pet. App. 63a).

As indicated at pp. 2-5 above, ACA supported CCE and its educational standards to further the best interests of the chiropractic profession and its members, whose welfare ACA had a responsibility to protect and whose acceptance by the public it was responsible for promoting. ACA supported the diagnostic philosophy to protect the profession from malpractice suits for misdiagnosis or failure to recognize the symptoms of diseases, and from the nationally organized campaign of medical organizations to eliminate chiropractic from the health care market, on the ground that chiropractors lacked the necessary training and background to diagnose and treat human diseases. Also, there is no evidence that ACA ever exercised any influence or control over CCE's educational standards or accreditation policies, or had any anti-competitive intent.

In this case, the mere fact that both ACA and CCE supported the diagnostic philosophy is not sufficient to establish an illegal antitrust conspiracy, or that ACA had a motivation to enter into such a conspiracy,

see the discussion in *Kreuzer* v. *American Academy of Periodontology*, 735 F.2d 1479, at 1487-88 (D.C.Cir. 1984); *Venzie Corp.* v. *United States Mineral Products Co.*, 521 F.2d 1309, at 1314-15 (3d Cir. 1975). Bearing in mind the Court's conclusion that petitioners failed to prove that ACA's activities diminished competition in a relevant chiropractic market (see Pet.App.64a), the District Court's dismissal of ACA was fully justified.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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